

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JUDY DeWYER

Plaintiff,

v.

TEMPLE UNIVERSITY
and RHONDA BLANTON

Defendants.

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CIVIL ACTION

00-CV-1665

MEMORANDUM

BUCKWALTER, J.

February 5, 2001

Presently before the Court is Temple University's ("Temple") and Rhonda Blanton's ("Blanton") (collectively "Defendants") Motion to Dismiss and plaintiff Judy DeWyer's ("Plaintiff") Response thereto. Plaintiff, an employee at Temple supervised by Blanton, pleads twelve counts in her Amended Complaint. Counts I and II assert claims against Temple under the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq. ("ADA"), and the Pennsylvania Human Relations Act, 43 P.S. § 951 et. seq. ("PHRA"), for denial of reasonable accommodation of her disability. In Counts III and IV, Plaintiff claims Temple violated the "public accommodation" provisions of the ADA and the PHRA. Plaintiff brings Counts V and VI under the retaliation provisions of the ADA and the PHRA and Counts VII, VIII and IX under Title VII, 42 U.S.C. § 1981, and the PHRA for race discrimination. In Counts X and XI, Plaintiff asserts "aiding and abetting" claims against Blanton under the ADA and the PHRA. Finally, Plaintiff brings a Pennsylvania tort law claim for Intentional Infliction of Emotional Distress

(“IIED”) against Defendants in Count XII. For the reasons stated below, Defendants’ motion will be granted in part, and denied in part.

I. BACKGROUND

Plaintiff was an employee of Temple from approximately May 1980 to October 1999. In 1996, prior to Blanton becoming Plaintiff’s supervisor, Plaintiff was diagnosed with degenerative disc disease in her back, which caused Plaintiff disabling discomfort. After Plaintiff received her diagnosis, Plaintiff’s supervisor at the time, Edward Price (“Price”), informed Plaintiff she could use handicapped parking spaces near the front of the building in which they worked if she could acquire a handicapped parking placard. In the meantime, Plaintiff was forced to either park in the lot behind the building which is allegedly 250 yards away and down a hill from the building or have a family member drive her to work.

In early 1998, Blanton, an African-American, became Plaintiff’s supervisor. Blanton’s replacement of Price resulted in Plaintiff becoming the only Caucasian in an otherwise African-American department. Later that year, Plaintiff received her handicapped placard and began using the designated parking spaces in the front of the building as Price had instructed. Blanton told Plaintiff not to use the spaces because they were reserved for supervisory staff. Blanton, however, permitted another non-supervisory employee, who was African-American, to use the spaces. Ignoring Blanton’s instructions, Plaintiff parked in the handicapped spaces. Blanton responded by citing Plaintiff with insubordination, suspending Plaintiff for three days without pay, and threatening Plaintiff with termination if she used the spaces again.

Plaintiff filed a grievance through her union and filed a complaint with the Pennsylvania Human Relations Commission ("PHRC") alleging discrimination. In what Plaintiff characterizes as retaliation, Blanton subsequently required Plaintiff to submit a doctor's note to justify her wearing sneakers, accused Plaintiff of sleeping on the job and denied plaintiff vacation and personal time.

In or about August 1999, Plaintiff took a medical leave of absence and was terminated when the leave expired during Fall 1999.

II. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that, in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may be raised by motion. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court must take all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The court must only consider those facts alleged in the complaint in considering such a motion. See ALAv. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. DISCUSSION

Defendants do not motion to dismiss Plaintiff's Counts I and II. Defendants do, however, contest all other counts set forth in Plaintiff's Amended Complaint. Each of these contested claims is addressed below in turn.

A. Counts III and IV - Public Accommodation

The Court will dismiss Plaintiff's Counts III and IV which are grounded in the Public Accommodation provisions of the ADA and the PHRA. ¹Plaintiff asserts she brings these claims not as an employee but as a private citizen who is being denied access to parking for disabled persons. The Court is not persuaded by Plaintiff's argument and relies upon both the ADA and Third Circuit case law in coming to the decision to dismiss these public accommodation claims.

The Court believes Congress' structure of the ADA is a clear indication Title I of the Act governs employment related discrimination claims, leaving Title III of the Act inapplicable to employment discrimination except in rare situations, which this case does not constitute. First, Plaintiff fits the definitions of "employee" and "qualified individual" as defined by 42 U.S.C. § 12111(4) and (8), marking her an appropriate Plaintiff under Title I. Furthermore, Title I speaks directly to Plaintiff's claim that she asked for and was denied access to disabled persons' parking which she needed to access her workplace comfortably. The Act reads in pertinent part:

1. Pennsylvania courts generally interpret the PHRA in accord with its federal counterparts; consequently, federal courts treat PHRA claims as coextensive with ADA claims. See Kelly v. Drexel University, 94 F.3d 102, 105 (3d Cir. 1996).

The term 'discriminate' includes not making a reasonable accommodation to the known physical... limitations of another qualified individual with a disability who is an ...employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]...

42 U.S.C. § 12112(b)(5)(A).

To find Title III applicable in this case would be to ignore Congress' attempt to carve out specific legislation to govern disability discrimination in the employment context.

Looking beyond the structure of the ADA and the spirit of the language therein, the Court's decision to dismiss these claims is also based on Third Circuit case law which brings to the fore this relationship between Title I and Title III in employment related discrimination cases. In Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998), the Third Circuit addressed the issue of whether an employee could use Title III to sue an employer or an insurance company used by the employer for offering lesser benefits for mental disabilities than it offered for physical disabilities. First, the Ford Court relied upon the statutory construction of the ADA to determine Title III did not govern the claims against the employer. Ford 145 F.3d at 612 (explaining the structure of the ADA indicates Title I and not Title III governs the "terms and conditions of employment by providers of public accommodations" when the benefits at issue are provided for the plaintiff by her employer in the context of her employment).

Second, the Ford Court determined Title III did not apply to the claims against the insurance company even though there was no employment relationship between the plaintiff and the insurance company because there was no nexus between the physical place of public accommodation - the insurance office - and the services denied in a discriminatory manner - the

insurance benefits. Ford 145 F.3d at 613. See also Menkowitz v. Pottstown Memorial Medical Center, 154 F.3d 113 (3d Cir. 1998) (finding an nexus when a defendant hospital, functioning in manner akin to a lessor, denied an independently contracted doctor to use the hospital's facilities to operate his own medical practice when he was diagnosed with Attention Deficit Disorder because there was a connection "between the services or privileges denied and the physical place of the hospital as a public accommodation").

The Court can conceive of a scenario where a plaintiff could successfully bring a claim against an employer under Title I and Title III. First, the plaintiff would have to show she is an "employee" and a "qualified individual" as contemplated by Title I and that she is seeking a reasonable accommodation as explained in 42 U.S.C. § 12112(b)(5)(A). Second, the plaintiff would have to show she seeks another benefit or privilege that is unrelated to her employment but is directly connected to her employer's physical place, thus satisfying the Ford nexus test without implicating her employment relationship with her employer, which would force her claim back to the ambit of Title I.

Here, Plaintiff cannot make such a dual showing. The Court is unwilling to allow Plaintiff to circumvent statutory distinctions with convenient self-labeling. The heart of Plaintiff's claim is Defendant denied her access to disabled parking which she needed to accommodate her disability and to make getting to work easier. Plaintiff, however, fails to show she is deprived from accessing a service or privilege as required by the Ford nexus test which is not related to her employment; Plaintiff does not assert she seeks to use the hospital for any service or privilege, such as serving her own clients or receiving hospital care as a patient herself. Because of the clear connection between Plaintiff's need to use disabled parking and Plaintiff's

employment, the Court does not believe Plaintiff can appropriately characterize herself as a non-employee for the sake of qualifying under Title III as well as Title I. The Court, therefore, will dismiss Counts III and IV.

B. Counts V and VI-Retaliation

Defendant also motions to dismiss Plaintiff's retaliation claims set forth in Counts V and VI. In light of Waiters v. Parsons, 729 F.2d 233 (3d Cir. 1994) (per curiam), and the two prong test set forth therein², the Court reserves making a determination on this issue until discovery is completed and a more thorough record regarding any PHRC or EEOC investigation is available.

C. Counts VII, XIII and IX-Race Discrimination

Defendant argues Plaintiff's race discrimination claims must be dismissed because Plaintiff fails to show one of the four prima facie elements of race discrimination, namely, an adverse employment action. Although Plaintiff does not allege facts in her Amended Complaint in the paragraphs corresponding to these counts which sufficiently show an adverse employment action, Plaintiff does allege facts in other parts of the Amended Complaint which do. In light of this and the liberal standard applied to motions to dismiss, the Court will not dismiss Plaintiff's race discrimination claims at this preliminary stage of litigation.

D. Counts X and XI-Aiding and Abetting

The Court now turns its attention to Plaintiff's claim that Blanton aided and abetted violations of the ADA and the PHRA. In recognizing the broadly accepted understanding

2. The Waiter test is: 1) do the acts alleged in a subsequent suit fall fairly within the scope of the prior EEOC [or PHRC] complaint, or 2) the investigation arising therefrom. Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1994) (per curiam).

among courts in this district that the ADA does not provide for individual liability, the Court will dismiss Count X which asserts individual liability on behalf of Blanton under the ADA. See Douris v. Brobst, No. 99-3357, 2000 U.S. Dist. LEXIS 1579, at *6-8 (E.D. Pa. Feb. 14, 2000) (citing the many district court cases in the Third Circuit and cases from the Eleventh and Seventh Circuits which have dismissed individual liability claims under the ADA).

Count XI, however, which seeks to hold Blanton individually liable for discrimination under the PHRA, will not be dismissed. The PHRA provides for individual liability under 43 P.S. § 955(e), and Plaintiff has provided sufficient information to outline the elements of her aiding and abetting claim. See Diciv. Commonwealth of Pennsylvania, 91 F.3d 542, 553 (3rd Cir. 1996) (acknowledging the PHRA provides for individual liability and that a supervisory employee may aid and abet harassment by not taking prompt action to end it).

E. Count XII-Intentional Infliction of Emotional Distress

Finally, Defendants argue Plaintiff's state law IIED claim against Temple and Blanton must be dismissed because 1) it is barred by Pennsylvania's Workers' Compensation Act, 77 P.S. § 1 et. seq., ("WPA") and 2) Plaintiff fails to show conduct on behalf of Defendants which meets the extreme and outrageous element of an IIED claim. These two arguments are addressed below in turn.

1. The Exclusivity of the WCA

In general, the WCA provides the exclusive remedy for employee work-related injuries. See 77 P.S. § 481(a). The statute, however, carves out an exception for employee injuries caused by the intentional conduct of third parties for reasons unrelated to an employee's employment. In relevant part, the exception reads:

the term 'injury arising in the course of his employment,' as used in this article, shall not include an injury caused by the act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment.

77 Pa. Const. Stat. Ann. §411(1).

The issue for this Court, therefore, is whether Plaintiff's IIED claim falls within this statutory exception. Although courts have applied the exception in very limited circumstances, see, e.g., Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997), application of the so-called "personal animus" or "third-party attack" exception has varied considerably. See Fugarinov v. University Servs., No. 00-3234, 2000 U.S. Dist. LEXIS 17771, *12-14 (E.D. Pa. Dec. 7, 2000) (describing the varied treatments courts in this district give the "personal animus" and "third-party attack" exception). Judge Joyner aptly cut to the heart of the debates surrounding the exception when he noted:

Notwithstanding the various interpretations, the critical inquiry in determining the applicability of the third-party attack exception is whether the attack was motivated by personal reasons, as opposed to generalized contempt or hatred, and was sufficiently unrelated to the work situation so as not to arise out of the employment relationship.

Id. at *14.

In this case, the discrimination Plaintiff alleges manifested in behavior displayed only at the workplace—reprimands, suspensions, criticisms, and requiring Plaintiff to park other than where she desired—and therefore is entirely related to the work situation and arises solely from the employment relationship. Consequently, the WCA exception would not apply and the WCA would bar Plaintiff's IIED claim. The Court, however, need not decide this question because, even assuming the WCA exception does apply, Plaintiff fails to allege behavior on the

part of Defendants which is extreme and outrageous, an element Plaintiff must show to state a cognizable IIED claim.

2. The Extreme and Outrageous Element

In Pennsylvania, to state a claim for IIED, a plaintiff must show extreme and outrageous conduct that is deliberate or reckless and causes severe emotional distress. See, e.g., Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 275-76 (3d Cir. 1985). The conduct complained of must be so outrageous, and so extreme in degree, as to be regarded as “‘atrocious’ and ‘utterly intolerable in a civilized community.’” Clark v. Township of Falls, 890 F.2d 611, 623 (3d Cir. 1989) (citations omitted). Here, Defendants challenge Plaintiff’s IIED claim by asserting the conduct of which Plaintiff complains is not sufficiently extreme or outrageous to give rise to a valid IIED claim.

In considering Plaintiff’s instant claim and Defendants’ argument to dismiss it, the Court is mindful of the conservative approach towards IIED claims taken by the Third Circuit and by courts of the Commonwealth of Pennsylvania. The Third Circuit has stated it is “extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress.” Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988). Furthermore, examples of sufficiently horrible behavior which have given rise to a valid IIED claim in Pennsylvania courts include: hospital employees giving false reports so someone would be indicted for homicide; a defendant sexually harassing his employee, forbidding her from speaking with others, following her at work, and withholding necessary information from her; and, a defendant hitting a child with his car and burying him on the side of the road only to be

discovered by the parents months afterwards. Clark, 890 F.2d at 623-624 (citing Pennsylvania cases to show how horrible one's behavior must be to meet the extreme and outrageous element of an IIED claim); see also Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990) ("Pennsylvania courts have applied the law cautiously.").

The facts alleged by Plaintiff in the instant cases simply are not as objectionable as the examples set forth *supra*. Plaintiff alleges Blanton 1) berated her for parking in handicapped spaces despite having a handicapped parking placard; 2) allowed another non-supervisory employee of Blanton's race (which Plaintiff is not) to park in those same spaces without a handicapped license plate or placard; 3) cited Plaintiff within subordination; 4) suspended Plaintiff for 3 days without pay; 5) retaliated against Plaintiff by not allowing her to wear sneakers although other employees were allowed; 6) accused Plaintiff of sleeping on the job; and 7) denied Plaintiff vacation and personal time. Granting every inference to Plaintiff, and keeping in mind the chary approach taken with IIED claims, the Court does not believe the facts Plaintiff alleges rise to the level of atrociousness necessary to state a cognizable claim. The Court will therefore dismiss Plaintiff's IIED claim.

IV. CONCLUSION

For the reasons set forth above, defendants Temple University's and Rhonda Blanton's Motion to Dismiss will be GRANTED in part and DENIED in part.

An appropriate order follows.

**INTHEUNITEDSTATESDISTRICTCOURT
FORTHEEASTERNDISTRICTOFPENNSYLVANIA**

JUDYDeWYER

Plaintiff,

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TEMPLEUNIVERSITY
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Defendants.

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CIVILACTION

00-CV-1665

ORDER

ANDNOW,this5thdayofFebruary,2001,uponconsiderationofTemple
University'sandRhondaBlanton's(Defendants)MotiontoDismiss(DocketNo.6)andplaintiff
JudyDeWyer'sResponsethereto(DocketNo.8) *etcetera* ,itisherebyORDEREDthat
Defendants'motionisGRANTEDinpartandDENIEDinpart.Morespecifically,it is
ORDEREDasfollows:

5. RegardingCountIII,Defendants'motionisGRANTED;
6. RegardingCountIV,Defendants'motionisGRANTED;
7. RegardingCountV,Defendants'motionisDENIED;
8. RegardingCountVI,Defendants'motionisDENIED;
9. RegardingCountVII,Defendants'motionisDENIED;
10. RegardingCountVIII,Defendants'motionisDENIED;
11. RegardingCountIX,Defendants'motionisDENIED;

12. RegardingCountX,Defendants'motionisGRANTED;
13. RegardingCountXI,Defendants'motionisDENIED;
14. RegardingCountXII,Defendants'motionisGRANTED.

ITISSOORDERED.

BYTHECOURT:

RONALDL.BUCKWALTER,J.